IN THE HIGH COURT OF DELHI AT NEW DELHI

CM(M) No. 1832/2005

Judgment delivered on: 20th September, 2007

Shri J.K. Bhatia ..... Petitioner
Through: Mr.Lalit Trakru, Adv.

versus

Shri A.K. Bhatia & Ors. ..... Respondents
Through: Mr.Pawan Kumar Agarwal, Adv.
for respondent No.1

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

KAILASH GAMBHIR, J. Oral:

This petition is directed against the order dated 06.07.2005 passed by the Trial Court whereby the application filed by one of the plaintiffs/respondent No.1 Shri A.K. Bhatia was disposed of with the directions that the order of withdrawal of suit

dated 20.4.2004 was recalled as a result of which the other plaintiffs would stand transposed as defendant Nos.3 and 4. The Court also gave the directions that the position in the case would be relegated back to the proceedings as it existed on 13.04.2004. Aggrieved with the said order, the present petitioner who was one of the plaintiffs in the suit and at whose behest the suit was withdrawn by moving an application under Order 23 Rule 1 CPC has approached this Court assailing the said order dated 6.7.2005. Brief facts necessary for deciding the present petition inter alia are that a suit for recovery of Rs.6,40,055/- was filed by the present petitioner along with his two brothers, respondent Nos.1 and 2 herein, against respondent Nos.3 and 4 on the allegation that the said respondent Nos.3 and 4 were tenants under the plaintiffs in respect of premises bearing No. C-16, First Floor, Shopping Centre, Vasant Vihar, New Delhi. It was alleged that these respondent Nos.3 and 4 had illegally recovered a sum of Rs.5,50,000/- as Pugri/unlawful consideration for vacating and relinquishing their tenancy rights in the suit premises and consequently the said suit for refund/recovery of the said amount along with interest and recovery of arrears of rent etc was filed. Needless to say that the suit was being

contested by respondent Nos.3 and 4 who were defendant Nos.1 and 2 before the Trial Court. During the pendency of the said case, one of the plaintiffs i.e. petitioner herein, had filed an application under Order 23 Rule 1 CPC seeking withdrawal of the said suit against the defendants. The reason for withdrawal as stated by plaintiff No.3 was that in a partition suit between the brothers, final decree of compromise vide judgment dated 11.1.2002 came to be passed and as a result of the said decree, plaintiff No.3 became absolute owner of the said premises i.e. C-16, First Floor, Shopping Centre, Vasant Vihar, New Delhi. The relevant portion of the judgment was also reproduced in the said application. Based on the said compromise decree, plaintiff No.3 had moved an application for withdrawal of the said suit which was originally filed by all the plaintiffs No. 1 to 3 against the defendants and vide order dated 20.4.2004, the Trial Court after recording the statement of the attorney of the said plaintiff No.3/petitioner herein and of the counsel representing the defendants directed the suit to be disposed of as compromised. Against the said compromise the plaintiff No.1/respondent No.1 herein had preferred an application under Order 23 Rule 1 and 3 read with Section 151 CPC seeking recall and setting aside of the

order dated 204.2004 and for restoration of the suit for its proper and effective adjudication on merits as the same stood immediately prior to 20.4.2004. On the said application of plaintiff No.1, Mr.A.K. Bhatia, the impugned order dated 06.7.2005 was passed by the Trial Court and this very order is under challenge in the present writ petition preferred by the petitioner/plaintiff No.3.

I have heard learned counsel for the parties at considerable length. The contention of counsel for the petitioner is that once the compromise decree came into effect whereby the petitioner became sole and absolute owner of the said property bearing No. C-16, First Floor, Shopping Centre, Vasant Vihar, New Delhi which was in occupation of respondent Nos.3 and 4, then the petitioner alone had the right and locus standi to move the application under Order 23 Rule 1 seeking withdrawal of the suit. Counsel states that there is nothing illegal on the part of the petitioner in moving such an application and seeking withdrawal of the suit.

Per contra, Mr.Pawan Kumar Agarwal, counsel for respondent No.1 urges that once the suit was filed by all the plaintiffs, the withdrawal could only take place after same is

sought by all the plaintiffs and not by a single plaintiff. Counsel for the respondent has placed reliance on sub-rule 5 of Rule 1 of Order 23 for better appreciation of the matter. The said sub-rule 5 of Order 23 is reproduced as under:-

> "(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs."

I find myself in agreement with the submissions of Mr.Pawan Kumar Agarwal, Advocate representing respondent No.1. The said sub-rule 5 of Rule 1 of Order 23 clearly mandates that withdrawal under sub-rule 1 or under sub rule 3 of Order 23 for any suit or even a part of the claim at the instance of one of the several plaintiffs cannot take place unless there is a consent of all the other plaintiffs. The said provision of law thus mandates that consent of the co-plaintiffs for seeking withdrawal of the suit or part thereof is mandatory and unless there is a consent of the other plaintiffs, the withdrawal cannot take place. The perusal of the application filed by the petitioner under Order 23 Rule 1 does not even state that there was any kind of consent given to the petitioner by the respondent Nos.1 and 2. The said application is

stated to have been moved on behalf of co-plaintiffs and even in prayer para 2 of the said application it is nowhere stated that the petitioner alone was seeking withdrawal of the suit. Perusal of the averments contained in the said application shows that the petitioner thought of moving the application alone without taking the consent of the other plaintiffs on the strength of compromise deed under which the petitioner is stated to have become sole and absolute owner of the property in question to the exclusion of other plaintiffs. Even if this position is accepted as correct that the present petitioner became sole and absolute owner of the said property but still for withdrawal of the suit the consent of other co-plaintiffs was imperative and it is not that single plaintiff could come forward and withdrew the suit. It has not been explained as to what prevented the petitioner to take the consent of the other plaintiffs/respondents No.1 & 2 for seeking withdrawal of the suit.

It is no doubt true that the plaintiff has unqualified right to withdraw or abandon the suit or part thereof, but in case where there are more than one plaintiffs then such a suit or part thereof can be withdrawn only with the consent of the other co-plaintiffs. Sub Rule 5 of Rule 1 of Order 23 CPC is a non-obstante clause

and, therefore, the Courts have to be very careful in permitting withdrawal of the suit filed by several plaintiffs unless all the co-plaintiffs have consented to the same. In the case in hand admittedly the petitioner, who was plaintiff No.3 before the Trial Court had moved the said application seeking withdrawal of the suit without taking any consent of the other co-plaintiffs and such an act on the part of the petitioner is clearly in violation of mandate of sub Rule 5 of Rule 1 of Order 23 CPC.

I, therefore, do not find any infirmity in the order passed by the learned trial court. I do not find any merit in the present petition and the same is dismissed. DASTI.

September 20, 2007 **KAILASH GAMBHIR, J**
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